

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MODESTO ORTEGA,

Plaintiff,

vs.

WELLS FARGO BANK, a California
corporation; PRIMARY FINANCIAL
SERVICES, LLC; FIRST AMERICAN
LOANSTAR TRUSTEE SERVICES; and
DOES 1 through 20,

Defendants.

CASE NO. 09 CV 1531 JM (NLS)

**ORDER GRANTING
DEFENDANT WELLS FARGO
BANK'S MOTION TO DISMISS**

Doc. No. 24

Plaintiff Modesto Ortega ("Ortega") initiated this lawsuit for claims arising out of a residential mortgage transaction. (Doc. No. 1). After the court granted in part and denied in part Defendant Wells Fargo Bank, N.A.'s ("Wells Fargo") motion to dismiss Ortega's first amended complaint (Doc. No. 22), Ortega filed a second amended complaint ("SAC"). (Doc. No. 23). In his SAC, Ortega raises four claims: (1) intentional misrepresentation; (2) fraudulent concealment; (3) violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605; and (4) violation of the Truth In Lending Act ("TILA"). (Doc. No. 22). Wells Fargo now moves to dismiss the intentional misrepresentation, fraudulent concealment, and TILA claims. (Doc. No. 24). Ortega filed an opposition and Wells Fargo filed a reply. (Doc. Nos. 25, 26).

1 The court finds this matter appropriate for disposition without oral argument. *See Civ*
 2 LR 7.1(d)(1). For the following reasons, the court hereby GRANTS Wells Fargo's motion to
 3 dismiss without leave to amend.

4 **I. BACKGROUND**

5 In April 2007, Ortega purchased a home in Calipatria, California, with financing
 6 obtained from Wells Fargo. (SAC ¶¶ 6-7). Ortega, who does not speak English, negotiated
 7 the loan in Spanish with Wells Fargo's employee Claudia Suarez-Narvaez ("Suarez-Narvaez").
 8 (SAC ¶ 7). Nonetheless, all of the loan documents were in English. (SAC ¶ 7). At some
 9 point, Ortega stopped making payments on the mortgage. (SAC ¶ 18). Eventually, the
 10 property went into foreclosure and was sold at a trustee's sale. (SAC ¶¶ 19, 20).

11 **II. LEGAL STANDARD**

12 A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the
 13 pleadings. *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978). In evaluating the motion,
 14 the court must construe the pleadings in the light most favorable to the plaintiff, accepting as
 15 true all material allegations in the complaint and any reasonable inferences drawn therefrom.
 16 *See, e.g., Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). While Rule 12(b)(6)
 17 dismissal is proper only in "extraordinary" cases, the complaint's "factual allegations must be
 18 enough to raise a right to relief above the speculative level." *United States v. Redwood City*,
 19 640 F.2d 963, 966 (9th Cir. 1981); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
 20 The court should grant 12(b)(6) relief only if the complaint lacks either a "cognizable legal
 21 theory" or facts sufficient to support a cognizable legal theory. *Balistreri v. Pacifica Police*
 22 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

23 **III. DISCUSSION**

24 **A. Intentional Misrepresentation / Fraudulent Concealment**

25 Ortega's first claim against Wells Fargo is for intentional misrepresentation; his second
 26 claim is for fraudulent concealment. Ortega claims that during the loan application process,
 27 Wells Fargo, through its agent Claudia Suarez-Narvaez, "instead of using [Ortega's] actual
 28 income, submitted the application based upon stated income." (SAC ¶ 25). In addition,

1 Suarez-Narvaez “submitted the loan unsigned by the Plaintiff.” (SAC ¶ 26). Finally, “Suarez-
 2 Narvaez further concealed the fact that underwriting standards are important to the borrowers
 3 as well as the lenders as they are an indication of the borrower’s ability to pay back the loan.”
 4 (SAC ¶ 26).

5 Under California law, the elements of fraud are false representation, knowledge of its
 6 falsity, intent to defraud, justifiable reliance, and damages. *See Bank of the West v. Valley*
 7 *Nat’l Bank of Ariz.*, 41 F.3d 471, 477 (9th Cir. 1994) (citation and quotation marks omitted).
 8 Under Federal Rule of Civil Procedure 9, a Plaintiff must plead fraud with particularity. “Rule
 9 9(b)’s particularity requirement applies to state-law causes of action.” *Vess v. Ciba-Geigy*
 10 *Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). “Averments of fraud must be accompanied
 11 by ‘the who, what, when, where, and how’ of the misconduct charged.” *Id.* at 1106 (quoting
 12 *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). “[A] plaintiff must set forth more than
 13 the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false
 14 or misleading about a statement, and why it is false.” *Id.* (quoting *Decker v. GlenFed, Inc.*
 15 *(In re GlenFed, Inc. Sec. Litig.)*, 42 F.3d 1541, 1548 (9th Cir. 1994)). On a claim for fraud,
 16 then, a “pleading is sufficient under rule 9(b) if it identifies the circumstances constituting
 17 fraud so that a defendant can prepare an adequate answer from the allegations.” *Moore v.*
 18 *Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989) (citation omitted). “While
 19 statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere
 20 conclusory allegations of fraud” are not. *Id.* Further, Rule 9(b) requires a plaintiff to attribute
 21 particular fraudulent statements or acts to individual defendants. *Id.*

22 Ortega’s second amended complaint, like his first amended complaint, fails to meet the
 23 particularity standards imposed by Rule 9. Indeed, Ortega makes only insubstantial changes
 24 to his fraud allegations as compared to the allegations within the first amended complaint. In
 25 the court’s order dismissing the first amended complaint, the court held,

26 Although Ortega attributes false statements to a particular person, Suarez-
 27 Narvaez, the details of the false statements are still missing. The complaint still
 28 fails to allege what was said, how those statements were false, and how they
 damaged Ortega. In addition, Ortega fails to allege that anyone made false
 statements to him. Therefore, Ortega’s claim for intentional misrepresentation
 is insufficiently pled.

1 These deficiencies are still present in Ortega's second amended complaint, and apply equally
 2 well to Ortega's fraudulent concealment cause of action. As such, Wells Fargo's motion to
 3 dismiss this claim is granted. Furthermore, as Ortega demonstrates an inability to address the
 4 deficiencies in his complaint through amendment, the court finds that further leave to amend
 5 would be futile.

6 **C. Violation of TILA**

7 Ortega's fourth claim against Wells Fargo is for violation of TILA, 15 U.S.C. § 1601,
 8 *et seq.* A request for any damages under TILA is subject to a one-year statute of limitations,
 9 typically running from the date of the loan execution. 15 U.S.C. § 1640(e). The Ninth Circuit
 10 has held equitable tolling of civil damages claims brought under TILA may be appropriate "in
 11 certain circumstances," such as when a borrower might not have had a reasonable opportunity
 12 to discover the nondisclosures at the time of loan consummation. *King v. State of California*,
 13 784 F.2d 910, 914-15 (9th Cir. 1986).

14 Ortega received the loan in April 2007. Ortega then brought this action in July of 2009,
 15 more than a year after the statute of limitations expired. Ortega alleges that he

16 is entitled to equitable tolling because the Plaintiff was in no position to discover
 17 the violation of TILA until a forensic review of his loan documents was
 18 conducted on April 30, 2009. Plaintiff is not a mortgage professional and would
 19 be unable to analyze whether the Truth in Lending Statements understated the
 20 amount financed and the APR. Plaintiff received an adjustable rate mortgage,
 which would made [sic] determining whether the Truth in Lending Statement
 was accurate impossible unless the Plaintiff has extensive mortgage experience
 with adjustable interest rates such as LIBOR index, upon which interest rates are
 based. Therefore, the statute of limitations tolled on or about April 30, 2009.

21 (SAC ¶ 60). Further, Ortega argues that equitable tolling is appropriate because his loan
 22 documents were not provided in Spanish. *Cf. Pelayo v. Home Capital Funding*, No. 08-cv-
 23 2030 IEG (POR), 2009 WL 1459419 at *5 (S.D. Cal. May 22, 2009) (finding equitable tolling
 24 sufficiently pled where a Spanish speaker received loan documents in only English).

25 Nonetheless, the court finds Ortega's allegations insufficient to equitably toll the statute
 26 of limitations. Ortega did not conduct his "forensic review" until two years after receiving the
 27 loan, and only a few weeks before receiving a Notice of Trustee's Sale on May 13, 2009.
 28 Therefore, it seems Ortega did not question the propriety of his loan documents until months


1 after he stopped paying his mortgage. Even with the obstacles of a complicated loan and a
2 language barrier, Ortega does not allege facts demonstrating due diligence on his part in
3 understanding his loan documents before the statute of limitations ran. Any irregularities in
4 Ortega's loan would have been apparent from the face of the documents he received at closing.
5 Ortega's belated efforts at finding the alleged irregularities preclude his TILA claim.
6 Therefore, the court grants Wells Fargo's motion to dismiss Ortega's TILA claim.

7 **V. CONCLUSION**

8 For the foregoing reasons, the court hereby GRANTS Defendant Wells Fargo's motion
9 to dismiss the intentional misrepresentation, fraudulent concealment, and TILA claims without
10 leave to amend. Wells Fargo shall file an answer to Plaintiff's RESPA claim no later than
11 June 11, 2010.

12 **IT IS SO ORDERED.**

13 DATED: May 11, 2010

14 
15 Hon. Jeffrey T. Miller
16 United States District Judge
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